Civil Procedure

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CIVIL PROCEDURE

The most significant development in civil procedure law during the August, 1974 Term of the Wisconsin Supreme Court was the court's adoption of the Wisconsin Rules of Civil Procedure. While the new rules will bring about important changes in Wisconsin civil procedure in many respects, a comprehensive analysis of them is beyond the scope of this article. Since the new rules of civil procedure have an effective date of January 1, 1976, none of the cases decided during the August, 1974 Term dealt directly with the application or interpretation of the new rules. Thus, certain of the cases decided at this term will have little or no applicability to actions commenced after the end of 1975. Other decisions, however, will be fully applicable after the new rules of civil procedure take effect. So that this article may be of more than academic interest, appropriate references to and discussion of the new rules of civil procedure will be made in the following analyses.

I. JURISDICTION

The decision in General Homes, Inc. v. Tower Ins. Co. will apply to actions commenced prior to the beginning of 1976, but its authority thereafter is uncertain. In General Homes, the plaintiff suffered a fire loss on December 30, 1971, and mailed its summons and complaint to the Milwaukee County Sheriff's Department for service sometime before December 30, 1972. The summons and complaint were received by the Department on January 3, 1973, and were served personally upon the defendant insurer on January 5th. The defendant moved for summary judgment, asserting that action had not been commenced within one year from discovery of the loss as required by the fire insurance contract. Appeal was taken from the trial court's order denying summary judgment.

The Supreme Court of Wisconsin affirmed the trial court,

1. 67 Wis. 2d 585 (1975).
2. 67 Wis. 2d 97, 226 N.W.2d 394 (1975).
holding that the plaintiff had effectively commenced action prior to the contractual deadline by mailing the summons and complaint to the sheriff. Wisconsin Statutes sections 893.40 and 269.34(4) were construed in conjunction with one another by the court in reaching its conclusion. Section 893.40 deems an attempt to commence an action by delivery of the summons to the sheriff, with the intent that it actually be served, equivalent to commencement. Under the facts present in the case at bar, the summons was mailed prior to the expiration of the time limit, but was not received by the sheriff until after the deadline had passed. Interpretation of the term "delivery" was thus crucial. The court stated that delivery was not defined in the statute, but that section 269.34(4), which regulates service of papers, provides that "service by mail is complete upon mailing." It was recognized that delivery to the sheriff was not actual service of a paper in a lawsuit, and that section 269.34(4) technically might not apply, but the court determined that the legislative policy judgment concerning the certainty of reception following mailing rendered the section applicable. The opinion noted that the sheriff's address was readily ascertainable and that an appropriately addressed letter was certain to reach that destination. With delivery by mail virtually assured, the court indicated that personal delivery of process to the sheriff was unnecessary and that utilization of a "mailbox rule" in this instance was proper.

Adoption of the new Wisconsin Rules of Civil Procedure, however, has resulted in repeal of section 893.40 and 269.34(4), and has created an altered method for commencement of actions. Section 801.02(1) of the rules states:

A civil action in which a personal judgment is sought, other than certiorari, habeas corpus, mandamus or prohibition, is commenced as to any defendant when a summons and complaint naming him as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon him under this chapter within 60 days.

Procedure for commencement of an action under the new Wisconsin rules is thus made more similar to that under the Federal Rules of Civil Procedure. 3 An action is begun not when

the defendant is served, but when the original summons and complaint are filed with the court.

Therefore, it appears that actions may effectively have been commenced through December 31, 1975, by mere mailing of process to the sheriff "or other proper officer of the county," so that he could serve the defendant.

What action on and after January 1, 1976, will be effective to commence a lawsuit in Wisconsin courts is, however, not entirely certain. While both the Wisconsin and federal rules deem an action commenced upon filing with the court, federal court cases have generally held that process need not actually be received in hand by the clerk of the court and be marked "filed" in order to commence an action. Process is considered to be filed when merely placed in the clerk's possession. Thus, suit has been held to be commenced at the time process was delivered to the clerk's officer, at the time process mailed to the clerk was deposited in his post office box, or even commenced at the time mailed process would have been delivered in course of post.

Though the filing requirement has at times been strictly construed, most federal courts seem to have taken a liberal and relatively nontechnical approach to the requirement. Nevertheless, timely delivery has still been required in most cases, and it appears that no federal court has gone so far as to say that commencement of an action is effective upon mailing. Resort has not been made to Rule 8(b) of the Federal Rules of Civil Procedure which states that service of subsequent pleadings and papers by mail is complete upon mailing.

Despite repeal of the statutes upon which the General Homes decision was based, an altered method of commencement under the new Wisconsin Rules of Civil Procedure and an apparent federal court insistence under similar procedural rules that the complaint be timely placed in the clerk's posses-

6. Id.
sion, there seems to be no compelling reason why a "mailbox rule" similar to that of *General Homes* should not be applicable under the new Wisconsin rules.

Section 801.14(2) deems service of both pleadings and papers by mail to be complete upon mailing, and while it might not technically apply to filing of pleadings and process, the policy judgment concerning certainty of reception after mailing, noted in *General Homes* should still be applicable. A letter addressed to the clerk of a court should be as certain to reach its destination as a letter addressed to the process division of a sheriff's department.

While it would be unseemly for the Wisconsin court to adopt a liberal commencement of action rule a few months prior to the effective date of the new Wisconsin Rules of Civil Procedure and to adopt a strict interpretation of the rules' filing requirement thereafter, the cautious practitioner should ensure actual delivery of the summons and complaint to the clerk before a limitations deadline in order to avoid a jurisdictional challenge.

II. PARTIES

Several significant decisions which related, broadly speaking, to the question of proper parties, were announced during the 1974 Term of the Wisconsin Supreme Court. In the recent case of *Schlosser v. Allis Chalmers Corp.*,\(^1\) the court held that compliance with the general joinder statutes was not a prerequisite to the maintenance of a class action. The court also held in *Schlosser* and in *Mussallem v. Diners' Club, Inc.*,\(^2\) that a class action involving claims for separate damage recoveries was not improper under the Wisconsin class action statute.\(^3\)

In the first of the above cases, two plaintiffs, both retired employees of the defendant's corporate legal department, brought a class action to recover damages for the alleged failure of the defendant to maintain group life insurance coverage as promised. The action was brought on behalf of "all other retired non-union salaried employees of defendant who were retired as of February 1, 1973," a class of about 5,000 persons. The complaint alleged that the corporation had, pursuant to its

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1. 65 Wis. 2d 153, 222 N.W.2d 156 (1974).
2. 69 Wis. 2d 437, 230 N.W.2d 717 (1975).
longstanding employee life insurance program, agreed to provide each member of the class with group life insurance at its sole cost and at specified minimum levels. The plaintiffs further asserted that the details of the insurance program had been communicated to the class members from time to time, that the members relied on defendant's promises in accepting and continuing employment and that the defendant unilaterally reduced minimum insurance coverage levels in 1973.

The defendant contended that the class members and their causes of action had to be joinable under sections 263.04 or 260.10 before a class action could be maintained under section 260.12. The defendant demurred, asserting that there were 5,000 separate and distinct causes of action, and thus no "subject of the action" in which all the members of the class had an interest pursuant to section 260.10. Similarly, it was claimed that the 5,000 separate causes of action did not affect all of the parties to the action as required by section 263.04.

The court agreed with the defendant that the facts presented in the case did not fall within the requirements of sections 260.10 or 263.04, but rejected the argument that a class action could not for that reason be maintained. It was concluded that although sections 263.04, 260.10, 260.11 and 260.12 all pertained to joinder of parties and causes of action, the specific statute governing class actions, section 260.12, was controlling, rather than the other more general joinder statutes. In interpreting the class action provisions of section 260.12, the Wisconsin court disapproved earlier cases which restrictively required that class members be necessary parties subject to compulsory joinder before a class action could be instituted. The restrictive interpretation given class action provisions by a number of courts was motivated by concern about the res judicata effect and the broader constitutional question of due process. In *Supreme Tribe of Ben-Hur v. Cauble* and *Hansberry v. Lee,* however, the United States Supreme Court put those questions to rest. The latter case stated that class

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14. Carstens v. Fond du Lac, 137 Wis. 465, 119 N.W. 117 (1909); Foster v. Rowe, 132 Wis. 269, 111 N.W. 688 (1907); Linden Land Co. v. Milwaukee Elec. Ry. & Light Co., 107 Wis. 493, 83 N.W. 851 (1899); Gilkey v. Merrill, 67 Wis. 459, 30 N.W. 733 (1885); Barnes v. Beloit, 19 Wis. 104 (1865); Newcomb v. Horton, 18 Wis. 594 (1864).
15. 7 Wright & Miller, § 1751.
17. 311 U.S. 32 (1940).
parties need not be necessary parties or have joint interests in order to be bound by the judgment; it is sufficient that "they are in fact adequately represented by parties who are present."18

Continuing the permissive attitude toward class actions expressed in most prior Wisconsin decisions, the Schlosser court reiterated the criteria for a class action:

(1) The named parties "must have a right or interest in common with the persons represented;" (2) the named parties "must fairly represent the interest or right involved so that the issue may be fairly and honestly tried;" and (3) it must be "impracticable to bring all interested persons before the court."19

Pointing to the size of the class and the zealous litigation by the attorney plaintiffs, the court summarily disposed of criteria (2) and (3) above. The court then described the community of interest criterion as follows:

[T]he court must determine whether the advantages of disposing of the entire controversy in one proceeding are outweighed by the difficulties of combining divergent issues and persons. It is a question of the balance of convenience whether the court will settle all the issues in one suit; or will settle only the common question in one suit and then allow the independent questions to proceed in separate equity suits; or not settle the controversy at all in a single suit.20

The court approved the flexible "balancing" test as stated by Chafee and applied it to the facts of the Schlosser case. While the defendant argued that different promises were made to each of the 5,000 class members and that different amounts of insurance were in force, the court noted that the plaintiffs alleged that the same insurance program was promised to each class member and that the allegation was to be regarded as true for the purposes of demurrer. Further, the defendant changed the program at the same time and in the same respect to each member. The common question which the court found related to the nature of the group life insurance program, the matter of the defendant's unilateral change in the program and the

18. Id. at 43.
19. 65 Wis. 2d at 169, 222 N.W.2d at 164-65.
20. Id. at 172, 222 N.W.2d at 166, quoting Z. Chafee, Some Problems of Equity 193 (1950).
appropriate formula to be used to measure the class members’ damages. On the other hand, the most significant question not common to the class was apparently the determination of each individual’s amount of damages. The court indicated that individual damage amounts could be established separately after the common issues were tried. Thus, it seems that the second of Chafee’s suggested alternatives was endorsed for the case at bar.

The same balancing test seems to have been implicitly applied in the subsequent case of *Mussallem v. Diners’ Club, Inc.* 21 Although the *Mussallem* case dealt primarily with the questions of whether a class action for the recovery of usurious interest was precluded by public policy or by statute, the court there considered the appropriateness of a class action based on numerous individual transactions. The court concluded that the *Schlosser* test had been met in that case, where, although different transactions and interest rates were involved, the 500 class members were all participants in the defendant’s same revolving charge account plan.

A further element of the class action balancing test must also be considered. In the closing paragraphs of the *Schlosser* decision, the court quoted with approval a California case 22 which stated:

> It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs. A procedure that would permit the allegedly injured parties to recover . . . is to be preferred over the foregoing alternatives. 23

Express recognition is thus given arguably to the equities of the case, and certainly to the practical effect which the barring of a class action would have on the plaintiffs’ ability to recover.

Although the *Schlosser* and *Mussallem* decisions are in substantial compliance with Federal Rule of Civil Procedure 23, the Wisconsin court’s criteria are not as extensive as those denominated in the federal rule. Since its adoption, rule 23 has been embroiled in controversy that has not abated with its 1966 amendment. In *Schlosser*, the court said of the Wisconsin class action statute:

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21. 69 Wis. 2d 437, 230 N.W.2d 717 (1975).
23. *Id.* at 715, 433 P.2d at 746, 63 Cal. Rptr. at 738, *quoted at* 65 Wis. 2d at 179, 222 N.W.2d at 169.
Sec. 260.12, Stats., has been described as "one of the worst" provisions in the Field Code, and has intentionally been left in vague language unamended. As an 1878 Revisor's note comments:

"... This section is not a very exact definition of the proceeding intended; but as the difficulty lies in the nature of the subject, it has seemed best to attempt no amendment, but to leave the requirements to be worked out by the courts as cases arise. See Stevens v. Brooks, 22 Wis. 663 (footnote omitted)."

Perhaps the controversy over rule 23 and the "difficulty with the subject matter" explains why no attempt was made to amend the class action provision of section 260.12 as appears in section 803.08 of the Wisconsin Rules of Civil Procedure. In any event, the decision in Schlosser is in conformity with section 803.03(5), which expressly excepts class actions from the general party joinder provisions of section 803.03.

Determination of whether a party is "necessary" or "indispensable" has historically been a complex and controversial problem. Under the conventional approach, courts and commentators have drawn distinctions between those parties who were to be deemed "necessary," and those who were to be held "indispensable." In the former class were those who generally ought to be included in the action unless there existed an excuse for their nonjoinder. In the latter class were those persons who had to be joined before an action could properly go forward. Following the landmark case of Shields v. Barrow, the distinction often turned on whether or not the interests of the parties were "severable." In the search for more certain rules, many decisions placed emphasis on determination of the nature of the interest or obligation involved, that is, whether the interest was "joint" or "severable," rather than on a determination of whether in equity and good conscience the action ought to go forward without the missing party. To make "pragmatic considerations and equity-and-good-conscience" determinative of who must be joined, however, rule 19 of the

24. 65 Wis. 2d at 168, 169, 222 N.W.2d at 164, citing Notes to Revision, ch. 118, § 2604, p. 185 (1878).
27. See JAMES § 9.21.
Federal Rules of Civil Procedure was amended in 1966.28

In the recent case of *Kochel v. Hartford Accident & Indemnity Co.*,29 the Wisconsin Supreme Court distinguished a previous case30 which had predicated findings of indispensability upon the theory that the parties held "joint interests," and reaffirmed the holding of *E. L. Husting v. Coca-Cola Co.*,31 that indispensability is dependent upon feasibility of joinder. A technical analysis of the property interest involved was, however, an important element in the *Kochel* decision.

Jerry Kochel, father of five adult children, was killed in an automobile accident. Subsequently, Kochel's two sons commenced a wrongful death action, but his three daughters, children of a previous marriage, were not joined as plaintiffs. The defendants interposed a plea in abatement and obtained summary judgment against the plaintiffs on the ground of failure to join indispensable parties.

The plaintiffs made a motion for reconsideration of the judgment and submitted affidavits from two of the sisters stating that they were residents of other states, that they had not been in the state of Wisconsin since their father's death, and that they renounced any interest in the plaintiffs' action. Plaintiffs' attorney submitted a third affidavit which stated that the remaining sister had been living abroad, her exact whereabouts unknown. Relying primarily upon *Truesdill v. Roach*,32 the trial court denied the plaintiffs' motion for reconsideration.

In *Truesdill*, a case involving a similar factual situation, the Wisconsin court held that all of the persons authorized by section 895.04 to bring a wrongful death action were united in interest and thus indispensable parties within the meaning of section 260.12. The court there said:

> We hold a cause of action for wrongful death is a single cause of action with ownership thereof vested in "the person to whom the amount recovered belongs" as designated in sec. 331.04(2).33

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28. 7 *Wright & Miller* § 1608.
29. 66 Wis. 2d 405, 225 N.W.2d 604 (1975).
31. 194 Wis. 311, 216 N.W. 833 (1927).
32. 11 Wis. 2d 492, 105 N.W.2d 871 (1960).
33. *Id.* at 497, 105 N.W.2d at 874.
The court stated in addition that "commencement of an action for wrongfull death by a person to whom only part of the recovery belongs" was impermissible. Thus it is apparent that the 

Truesdill holding was grounded upon the traditional determination of "jointness" or "severability" of the interests of the plaintiffs. However, the 

Truesdill decision contained the following language:

In the instant case no trial on the merits has been had and no reason given in the brief or pointed out why the plaintiff and the mother of the deceased child cannot start the action over or how they would be prejudiced thereby.35

Relying upon that qualification, the 

Kochel court seized the opportunity to condition mandatory joinder upon feasibility. It was held that the trial court erred in failing to consider the questions of jurisdiction over the absent parties, renunciation of interest, or running of the statute of limitations as to their possible claims. By requiring the trial court to examine pragmatic considerations, the court moved in the direction of the provisions of new section 803.03 which, except for subsection (2), is borrowed from rule 19 of the Federal Rule of Civil Procedure.

That inability to secure jurisdiction over a party might obviate that party's indispensability was established in the landmark case of 

E.L. Husting v. Coca-Cola Co.36 In the 

Husting case, the plaintiff brought action against the Western Coca-Cola Bottling Company for breach of contract and against local Wisconsin firms for aiding Western to breach the contract. The plaintiff also sought to restrain the local defendants from performing their contracts with Western. The trial court found Western's interests such as to render it indispensable, notwithstanding plaintiff's inability to serve Western with process under existing statutes. The supreme court reversed, holding that the necessary joinder statutes should not be construed to require the impossible.

The 

Kochel court reiterated the holding in 

Husting and considered the jurisdictional questions raised by the affidavits relating to the three absent sisters. Since the affidavits had not been controverted by the defendants, the court held them con-

34. Id. at 498, 105 N.W.2d at 874.
35. Id. at 499, 105 N.W.2d at 875.
36. 194 Wis. 311, 216 N.W. 833 (1927).
clusive. The absentees were thus found, because of their residence outside of Wisconsin and their lack of minimal contacts with the state, to be beyond the personal jurisdiction of the court. Since jurisdiction could not be asserted over the absent sisters, the court held, the plaintiffs' action was not defeated.

The finding that the absentees were not indispensable also rested on other grounds. The court found, as well, that the statute of limitations barred the sisters from commencing an independent wrongful death action in the future. In resolving this issue, the court relied upon the recent case of *Heifetz v. Johnson*, which held that when an otherwise indispensable party's ability to commence an independent action on the same matter was terminated by the statute of limitations, "indispensable" status also ceased. This was so, the court recognized, because:

> [T]he purpose of the mandatory joinder statutes is to protect the defendant against a multiplicity of suits and... the purpose is served when by operation of the statute of limitations the [absentee] is barred forever from any claim against the defendant.\(^{38}\)

The court found in *Kochel* that the plaintiffs had timely brought suit and that the statute of limitations had been tolled as to their "part" of the action. The statute had continued to run as to the sisters' portion, however, and was found to have barred their potential future claims. Thus the sisters were no longer indispensable parties.

While the *Kochel* decision rested partially upon the above pragmatic considerations, the nature of the property interest was of considerable importance. As stated previously, in *Truesdill v. Roach*,\(^{39}\) the court stated that persons authorized to bring a wrongful death action are united in interest. Furthermore, in *Heifetz v. Johnson*,\(^{40}\) it was said that certain parties are excluded from the equitable principle that the running of the statute of limitations terminates indispensability status. Joint owners, such as joint payees on a note, are said to be required to jointly bring an action because they are entitled to one undivided recovery. The *Kochel* court cited *Truesdill v. Roach*, however, in support of the proposition that a wrongful

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37. 61 Wis. 2d 111, 211 N.W.2d 834 (1973).
38. Id. at 123, 211 N.W.2d at 840-41.
39. 11 Wis. 2d 492, 105 N.W.2d 871 (1960).
40. 61 Wis. 2d 111, 211 N.W.2d 834 (1973).
death claimant is only entitled to recover the amount of his own individual loss. Claimants under the wrongful death statute then, although united in interest, are not tantamount to joint owners, and their "indispensable" status may be overcome by operation of the statute of limitations.

Thus the "verbal anomaly [of] an indispensable person who turns out to be dispensable after all," and a reliance upon conceptual, property-based classifications of interests, continue under the former mandatory joinder statute. Section 803.03 of the Wisconsin Rules of Civil Procedure, which replaced the former statute, expressly conditions joinder on feasibility and holds paramount a balancing test involving pragmatic and equitable analysis. Subsection (2) of the statute also requires that all persons who at the commencement of the action have claims based upon subrogation, derivation or assignment be joined with the party asserting a claim for affirmative relief. The Judicial Council Committee's Note states that the intention of subsection (2) is to require that "all 'parts' of a single cause of action . . . be brought before the court in one action." Thus it appears that under the new Wisconsin Rules of Civil Procedure there is to be but one commencement as to all of the claim's constituent parts, and that the rules deem holders of all of the "parts" to be necessary parties.

If such necessary parties cannot be joined, the court is to conduct an analysis under the standards of subsection 803.03(3) to determine if, in equity and good conscience, the action should go forward. That analysis should not be confined to or focused upon a technical consideration of the nature of the interest involved. While the type of interest will affect pragmatic questions of the adequacy of relief and possible prejudice to present and absent parties, analysis is not to cease there. The court must also consider the seriousness and immediacy of collateral consequences or of the threat of fresh action by the absentee. In addition, the court must take into account the effect of dismissal upon the plaintiff, the possibility of shaping relief to avoid prejudice or inequity, and other practical matters. Only if the court determines that the action ought not go forward will the missing party be denominated "indispensable."

One other recent case relating to the issue of proper parties also bears mention. The defendants in *Kujus v. Schmidman*, the group of liquor retailers, demurred to the complaint in an action brought by fellow Milwaukee County retailers to enjoin alleged violations of fair trade contracts. It was argued by the defendants that only producers or vendors had standing to seek an injunction for violation of the Wisconsin Fair Trade Act. Both the trial and the appellate courts found, however, that the plaintiffs were bound by the resale price restrictions of the fair trade agreements, and that they were affected and allegedly damaged by the defendants' actions. Therefore it was held, upon New York case law authority and a plain reading of the statute, that the plaintiff retailers fell within the class of "any person damaged thereby" and were authorized to bring the action.

The defendants attempted to rely on *Old Dearborn Distributing Co. v. Seagram Distiller Corp.*, the leading Supreme Court decision which established the constitutional validity of state fair trade laws. The Court there stated that the primary aim of the fair trade acts was to protect the goodwill value of the producer's product. On the issue of standing to bring suit, however, courts have generally concluded that a retailer may bring action against other retail sellers. Although fair trade laws have been enacted by forty-six of the states, their constitutional validity, social desirability and economic effectiveness have long been questioned. Fair trade acts in a majority of the states have succumbed to court decisions or legislative repeal.

The *Kujus* case might be viewed as an opportunity offered the Wisconsin court to curtail the effectiveness of the state's

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42. 66 Wis. 2d 544, 225 N.W. 2d 484 (1975).
45. 299 U.S. 183 (1936).
47. 2 Trade Reg. Rep. 6017, 6021 (1975).
48. Id. at 6041.
fair trade statute by restricting the class of persons who may seek to enjoin its violation. The court said, however:

It is not for courts to determine the wisdom of this type of legislation. It is enough to conclude that the legislature . . . gave standing to these plaintiffs to bring this type of action.⁴⁹

III. Pleadings

The sufficiency of the pleader's statement of facts in a complaint was the subject of the controversy in National Foundation of Health, Welfare & Pension Funds, Inc. v. Brookfield.⁵⁰ The Supreme Court of Wisconsin held in that case that where a party sought tax-exempt status, it was required to plead facts which brought it not only within the language of the exemption statute, but also within restrictive court interpretations of that statute.

The plaintiff, a non-profit, non-stock corporation, owned certain real and personal property in the City of Brookfield. A dispute arose between the plaintiff and the city over the exempt status of a portion of the property, and taxes were paid "under protest" in 1973. After a claim for a refund was filed and denied, litigation was commenced to recover taxes paid and to have the property in question declared tax-exempt under section 70.11(4). That section provides:

70.11 Property exempted from taxation. The property described in this section is exempted from general property taxes:

   (4) . . . Property owned and used exclusively by . . . educational . . . associations . . . but not exceeding 10 acres of land necessary for location and convenience of buildings while such property is not used for profit.

The plaintiff's complaint alleged that its property was tax-exempt "pursuant to section 70.11, Wis. Stats., as property owned and used exclusively by an educational association." The city's demurrer to the complaint was overruled by the trial court.

On appeal, the defendant argued that an allegation that the property was owned and used exclusively by an educational association was not tantamount to an allegation that the

⁴⁹ 66 Wis. 2d at 549, 225 N.W.2d at 487.
⁵⁰ 65 Wis. 2d 263, 222 N.W.2d 608 (1974).
property was used exclusively for educational purposes. Since neither the activities of the association nor the uses to which its property was put had been set out in the complaint, the statement of facts was claimed to be fatally defective. The plaintiff countered by urging the familiar proposition that complaints are to be liberally construed on demurrer and by asserting that the missing elements could be supplied by reasonable inference. The court agreed with the defendant and held that the demurrer should have been sustained.

The court’s decision in *National Foundation* may be seen as embodying two related concepts. First, a “special case” was presented wherein the plaintiff sought to have its property declared exempt from general taxes. The supreme court has repeatedly construed the statute by which the plaintiff claimed exemption\(^5\) to require the party seeking exemption to bring himself within the statute.\(^5\) Furthermore, the court has said that the exemption statutes are to be strictly construed, and the taxpayer must bring himself within the exact terms of the statute.\(^5\) Taxation is to be the rule, exemption the exception.\(^5\)

Second, the additional pleading requirement may be predicated upon the vagueness of the statute. It has been held that where a statute is “so indefinite, obscure and uncertain that it fails to define what acts are within its terms,”\(^5\) the complaint grounded on the statute must allege facts beyond the statutory language in order to establish the cause of action. Since the

2. Engineer & Scientists v. Milwaukee, 38 Wis. 2d 550, 157 N.W.2d 572 (1968); *In re Thomas’ Estate*, 1 Wis. 2d 402, 84 N.W.2d 68 (1957); Men’s Halls Stores v. Dane County, 269 Wis. 84, 69 N.W.2d 213 (1955); Bowman Dairy Co. v. Wisconsin Tax Comm., 240 Wis. 1, 1 N.W.2d 224 (1942).
3. State v. Madison, 55 Wis. 2d 427, 198 N.W.2d 615 (1972); Bethel Convalescent Home, Inc. v. Richfield, 15 Wis. 2d 1, 111 N.W.2d 913 (1962); State ex rel. Dane County Title Co. v. Board of Review, 2 Wis. 2d 51, 85 N.W.2d 864 (1957); Madison Aerie No. 623 v. Madison, 275 Wis. 472, 82 N.W.2d 207 (1957); Albion v. Trask, 256 Wis. 485, 41 N.W.2d 627 (1950); Comet Co. v. Wisconsin Dep’t. of Taxation, 243 Wis. 117, 9 N.W.2d 620 (1943).
4. State v. Madison, 55 Wis. 2d 427, 198 N.W.2d 615 (1972); Alonzo Cudworth Post No. 23 v. Milwaukee, 42 Wis. 2d 1, 165 N.W.2d 397 (1969); Engineers & Scientists v. Milwaukee, 38 Wis. 2d 550, 157 N.W.2d 572 (1968); *In re Thomas’ Estate*, 1 Wis. 2d 402, 84 N.W.2d 68 (1957); Evangelical Luth. Church v. Shawano County, 256 Wis. 2d 196, 40 N.W.2d 590 (1950); Legion Clubhouse v. Madison, 248 Wis. 380, 21 N.W.2d 668 (1946).
5. 2 Callahan’s Wisconsin Pleading and Practice 312 (1954), citing State v. Zillmann, 121 Wis. 472, 98 N.W. 543 (1904).
court found it necessary in an earlier case \textsuperscript{56} to construe the exemption statute in question as applicable only to educational associations devoted to "traditional" education activities, the restrictive construction in \textit{National Foundation} may have been an appropriate means of obviating vagueness in pleadings.

The additional pleading requirement of the \textit{National Foundation} case should be short-lived, however. Section 802.02(1) of the Wisconsin Rules of Civil Procedure borrows from Federal Rule 8(a) its general rule that a pleading contain:

\ldots a short and plain statement of the claim, identifying the transaction, occurrence or event out of which the claim arises and showing that the pleader is entitled to relief.

The Judicial Council Committee's Note avows that the federal pleading philosophy is adopted. For some time after the adoption of the Federal Rules of Civil Procedure, the federal courts struggled with the parameters of the phrases "short and plain statement of the claim" and "showing that the pleader is entitled to relief." \textsuperscript{57} Particularly troublesome was the belief that the latter phrase in effect required a statement of facts sufficient to constitute a cause of action. Endorsement of that belief brought about a return to code pleading. \textsuperscript{58} Similarly, some federal courts sought to engraft upon the rule a more extensive pleading requirement for special cases, civil antitrust actions in particular. \textsuperscript{59} Both interpretations are now generally rejected, \textsuperscript{60} and in actions seeking a tax refund, a claim stating a demand for a refund, without more, is sufficient in the federal courts. \textsuperscript{61} It would appear that under the notice pleading philosophy of the federal courts, the comparable Wisconsin Rules of Civil Procedure need not require an allegation that the restrictive construction of the tax exemption statute had been met by the plaintiff.

In the recent case of \textit{Becker v. Becker}, \textsuperscript{62} the Wisconsin court

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  \item \textsuperscript{56} Engineers & Scientists v. Milwaukee, 38 Wis. 2d 550, 157 N.W.2d 572 (1968).
  \item \textsuperscript{57} 5 \textsc{Wright} \& \textsc{Miller} §§ 1216, 1217.
  \item \textsuperscript{58} \textit{Id.} at § 1220.
  \item \textsuperscript{59} \textit{Id.} at § 1228.
  \item \textsuperscript{60} \textit{Id.} at § 1221.
  \item \textsuperscript{62} 66 Wis. 2d 731, 225 N.W.2d 884 (1975).
\end{itemize}
had occasion to consider whether equitable defenses were available against a plaintiff in a stockholder's derivative suit. Three brothers and their sister constituted the board of directors of a closely-held corporation. A stockholder's derivative action was commenced by one of the directors to recover allegedly excessive compensation paid two of the other directors. The defendants brought a motion for summary judgment, asserting that the plaintiff had himself voted for and received payment under the contracts which provided the allegedly excessive compensation, and that he had waited five years before commencing the action. Thus it was contended that the defenses of equitable estoppel, unclean hands and laches were established as a matter of law.

The motion for summary judgment was denied by the trial court on the ground that equitable defenses are not available against a plaintiff who has brought suit in a representative capacity. The denial of summary judgment was affirmed, but on different grounds. The supreme court found there remained substantial unresolved questions of fact, and for that reason summary judgment was unavailable. However, the court held in a brief opinion that a stockholder's derivative suit is an equitable action and that equitable defenses are available therein, notwithstanding the fact that the plaintiff brought action in a representative capacity.

Thus an equitable defense, based upon the improper conduct of the plaintiff, is effective to bar a plaintiff shareholder from bringing a derivative suit. The holding is consistent with federal cases interpreting rule 23.1 of the Federal Rules of Civil Procedure. The action is abated and the particular plaintiff is precluded from establishing the action. Another shareholder who is not similarly disqualified, however, may bring the action.

IV. Discovery

Two cases decided during the 1974 Term of the Wisconsin Supreme Court significantly affected the protection afforded to attorneys' work product. In *Blakely v. Waukesha Foundry Co.*, the supreme court held defendant's attorney to have

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64. See 7A WRIGHT & MILLER, § 1834.
65. Id.
66. 65 Wis. 2d 468, 222 N.W.2d 920 (1974).
waived protection of certain information through his course of conduct before trial. The attorney was required to furnish all other counsel in the case with a written report of the testing results and examination of an expert retained by the defendant.

The Blakely case was a products liability action which stemmed from the failure of certain yoke-bar castings manufactured by the defendant Waukesha Foundry Co. and incorporated into the plaintiffs' quick-cooking devices. After the lawsuit was commenced, Waukesha Foundry's attorney wrote to the plaintiffs' lawyer, informing him that inspection of the yoke-bars in the plaintiffs' possession was important to the defendant's case, and requested that the yoke-bars be temporarily turned over to the defendant for expert examination. It appeared from the record of pretrial conferences and motion hearings in the case that the plaintiff agreed to furnish the yoke-bars for examination and that the plaintiffs and the defendant agreed to exchange expert reports when inspection and testing by each side were completed.

After the yoke-bars were returned to the plaintiffs, a time for hearing was set by the trial court in the event that the experts' reports were not exchanged. As the deadline for the exchange of reports approached, the defendant's attorney notified counsel and the court by letter that the expert who had performed testing for the defendant had been retained by defense counsel on a personal consulting basis only, and that he did not intend to call the expert as a witness at trial. Therefore, Waukesha Foundry's attorney claimed that the results of the expert's examination were lawyer's work product under State ex rel. Dudek v. Circuit Court, and would not be available to opposing counsel.

The plaintiffs filed a motion asking the trial court to order the defendant foundry to turn over its expert's report. The defendant's attorney thereafter filed an affidavit stating that the expert had never submitted a formal, specific, written report to the defendant, and that defense counsel had only had oral discussions with the expert.

At the hearing on the plaintiffs' motion, the trial court judge indicated that he was clearly of the opinion that there had been a stipulation between the parties to exchange expert

67. 34 Wis. 2d 559, 150 N.W.2d 387 (1967).
reports. He also left no doubt that he was surprised and somewhat chagrined by defense counsel's use of legal procedures to obtain vital evidence for examination and his subsequent failure to exchange reports. Defendant's attorney was ordered to furnish a written report of the expert's examination and to make the expert available for adverse examination.

On appeal, the supreme court held that the defendant's lawyer had waived the work product privilege which otherwise would certainly have attached to the communications between the attorney and his nonforensic expert. The waiver was effective despite the lack of "a firm agreement that such exchange would be made under any and all conditions" and extended to all communications on the subject of test results and examination, written and oral, between the expert and the defendant or the defense attorney's law office. The supreme court therefore ordered the defendant's lawyer to produce all pertinent written communication from the expert and to furnish the other attorneys in the case with written summaries of all relevant oral communications and of all pertinent notes made by the lawyer and kept in his files. The portion of the trial court order which required the defendant's attorney to make the expert available for adverse examination by other counsel was, however, disapproved and reversed. The court stated that the waiver extended only to communications between the attorney and the expert and that no compelling need was demonstrated for such adverse examinations.

Although a reading of the Wisconsin Rules of Civil Procedure might indicate the contrary, the holding of the Blakely case ought to have continued vitality after the new rules take effect. Discovery of facts known and opinions held by experts who are not expected to be called as witnesses at trial is strictly limited by section 804.01(2)(d)(2) to "exceptional circumstances under which it is impossible for the party seeking discovery to obtain facts or opinions on the same subject by other

68. Id. at 589-92, 150 N.W.2d at 404-05.
69. 65 Wis. 2d at 478, 222 N.W.2d at 925.
70. Defendant's attorney admitted on oral argument that he had received written communication from the expert regarding the results of the examination and admitted further that existence of such communication had not been revealed to the trial court. The supreme court demonstrated considerable concern with this matter, since the attorney had filed an affidavit with the trial court which stated that no detailed written report had been received by him. 65 Wis. 2d at 476, 477, 222 N.W.2d at 924.
means." No such showing of exceptional circumstances was made or required in the Blakely case. Instead, the trial and appellate courts held that the defendant had waived immunity by stipulation and that the plaintiff was entitled to discover the facts and opinions communicated by the expert to the defendant and its attorneys, irrespective of special need.

Stipulations regarding methods of discovery other than those provided by chapter 804 are, however, expressly permitted by section 804.04, which was modeled after the 1970 amendment to Rule 29 of the Federal Rules of Civil Procedure. While section 804.04 requires written stipulations, a review of Wisconsin case law suggests that the requirement of a writing may not be strictly adhered to in situations such as that presented in Blakely.

A line of Wisconsin cases has held that oral stipulations entered into in open court are binding on the parties, notwithstanding the lack of a written agreement.71 Two other Wisconsin cases, State v. Eschweiler72 and Burnham v. Smith,73 hold that where injustice will be avoided, an oral stipulation will be given effect, even if the rules require a writing. A quotation from the latter case is instructive:

Although the rule requires stipulations to be in writing, in order to be binding, yet it was not designed to allow a party who had entered into a verbal stipulation, upon which his adversary had relied and acted, to obtain an unjust advantage, and destroy the other’s rights by disregarding it himself.74

A distinction has also been recognized between stipulations regarding “merely procedural matters” and those which are intended to affect substantive rights and obligations. Procedural stipulations have been viewed as requiring less formality than those substantive stipulations which have all the essential characteristics of contracts and ought to be in writing to minimize the potential for future disputes over important matters.75

71. Wyandotte Chem. Corp. v. Royal Elec. Mfg. Co., 66 Wis. 2d 577, 225 N.W.2d 648 (1975); Markham v. Markham, 65 Wis. 2d 735, 223 N.W.2d 616 (1974); Schmidt v. Schmidt, 40 Wis. 2d 649, 162 N.W.2d 618 (1968); Baker Land & Title Co. v. Bayfield County Land Co., 166 Wis. 601, 166 N.W. 314 (1918).
72. 158 Wis. 25, 147 N.W. 1008 (1914).
73. 11 Wis. 269 (1860).
74. Id. at 270.
The better practice clearly calls for reduction of procedural stipulations to writing in order to avoid controversy and to increase the likelihood of enforcement. Where, however, injustice would otherwise result to a party who had acted in good faith, the court may enforce an informal oral agreement, even where important procedural rights will be forfeited thereby.

In State ex rel. Shelby Mutual Ins. Co. v. Circuit Court, the Wisconsin court extended discovery immunity to the names and reports of nonforensic experts consulted by insurance company claims personnel in the evaluation of cases or in preparation for litigation. The plaintiff insurance company paid a claim on a policy of fire insurance, became subrogated to the rights of its insured, and commenced a products liability action against the General Electric Company. Defense counsel deposed the plaintiff's local claims manager pursuant to a subpoena duces tecum and sought the names and reports of experts retained by the plaintiff who had examined the electrical appliance which was the subject of the lawsuit. On the advice of counsel, the deponent declined to provide the requested information, and the questions were certified to the circuit court. The court ordered the questions to be answered, and the plaintiff petitioned the Wisconsin Supreme Court for a writ of prohibition.

The supreme court granted the writ after a consideration of policy and of pertinent language in the leading case of State ex rel. Dudek v. Circuit Court. In Dudek, the court had voiced concern for protection of information acquired in anticipation of litigation by persons other than lawyers, but the Shelby case marked the first concrete application of the "work product" immunity to nonlawyers. The court pointed out that the mental impressions of a lawyer were not in issue and could not constitute a ground for the extension of the immunity to a claims manager. Dudek, however, had indicated that the "mental processes of the attorney" rationale was not the sole basis for the lawyer's work product rule in Wisconsin; discouragement of evasion, sharp practices and indolence also underlay the rule. Thus, the court felt it appropriate to encourage the use of nonlawyer investigators as an incentive to efficiency and diligence. Further, the

76. 67 Wis. 2d 469, 228 N.W.2d 161 (1975).
77. 34 Wis. 2d 559, 150 N.W.2d 387 (1967).
work of claims personnel was recognized to be "particularly quasi-legal" in nature because it involved research and investigation to prepare for, or determine the necessity of, litigation.

A footnote to the opinion stated: "The gist of our holding is incorporated in the proposed Wisconsin Rules of Civil Procedure, sec. 804.01(2)(c)1 and (d)2 . . . ." Those subsections govern discovery of documents and tangible things prepared in anticipation of litigation or for trial, and discovery of facts known or opinions held by experts not expected to be called as witnesses, respectively. There is no doubt that under section 804.01(2)(d)2 reports of consulting, nonforensic experts retained by an insurance company claims manager would be immunized from discovery absent a showing of exceptional circumstances. Some question has arisen as to whether the names of nonforensic experts are similarly protected by rule 26(b)(4)(B), the portion of the Federal Rules of Civil Procedure corresponding to section 804.01(2)(d)2.1

The introductory language in section 804.01(2)(d) states that discovery "may be obtained only as follows . . . ." (emphasis added). Subsection 2 then states that facts known or opinions held by specially retained nonforensic experts may be discovered upon a showing of exceptional circumstances. While both the federal and the Wisconsin rules are silent as to discovery of the names of retained experts, the Advisory Committee Note to the 1970 amendment of Federal Rule 26 states: "As an ancillary procedure, a party may on a proper showing require the party to name experts retained or specially employed . . . ." Thus it appears that the names of the consulting experts may be obtained, but the nature of the "ancillary procedure" and the "proper showing" are not clear.8

On the other hand, the federal and Wisconsin rules have no provision for experts consulted informally in anticipation of litigation but not retained or specially employed. In view of the restrictive language of the discovery rules, it appears that the names and reports of such experts are not subject to discovery.81

78. 67 Wis. 2d at 475, 228 N.W.2d at 164.
79. See 8 WRIGHT & MILLER, §§ 2029, 2032.
80. It has been speculated that the "procedure" would be a rule 33 interrogatory, and that the party objecting to discovery might seek a protective order if he thought the names were irrelevant, privileged or for some other reason not properly discoverable. 8 WRIGHT & MILLER, § 2032.
81. Id. at § 2033.
Finally it should be noted, however, that an expert’s information which is not “acquired or developed in anticipation of litigation or for trial” is not subject to immunity and is discoverable by means of the routine discovery procedures.82

V. AFFIRMATIVE DEFENSES: STATUTE OF LIMITATIONS

In Rosenthal v. Kurtz,83 the Wisconsin Supreme Court engaged in a preliminary consideration of the constitutional validity of the statute of limitations84 relating to property damage, personal injury or wrongful death caused by the defective or unsafe condition of improvements to real property. While constitutionality of section 893.155 was not an issue in the appeal of the Rosenthal case, and the court’s decision there was based upon a reading of the statute which avoided a constitutional confrontation,85 the court nevertheless seriously questioned the validity of the statute. The opinion stated:

It would appear likely . . . that a constitutional challenge to sec. 893.155, Stats., on any one of several grounds, including improper classification, might have substantial arguable merit. We believe we would be derelict in our duty to the legislature if we did not point out the extremely shaky constitutional and statutorily anomalous underpinnings of the statute.86

The court concluded its discussion of section 893.155 by suggesting that in the future a case might arise in which the confrontation-avoiding technique used in Rosenthal would not be applicable and that the constitutionality of that statute would have to be faced head-on. Such a case was not long in coming.

Some eleven months after the decision in Rosenthal was announced, Kallas Millwork Corp. v. Square D Co.87 was argued before the Wisconsin court. In December, 1968, an underground high-pressure water line on Square D’s premises ruptured, causing the inundation of plaintiffs’ adjacent prop-

82. Id.
83. 62 Wis. 2d 1, 213 N.W.2d 741, 216 N.W.2d 252 (1974).
85. The court construed the statute to permit the bringing of an action against an architect within 6 years from completion of construction, even though the architect’s services were provided before completion of the structure.
86. 62 Wis. 2d at 11, 213 N.W.2d at 746.
87. 66 Wis. 2d 382, 225 N.W.2d 454 (1975).
It was alleged that defendant ITT Grinnell Corporation negligently installed the water line as part of a fire protection system sometime between 1945 and 1952. ITT Grinnell demurred to the complaint, relying on Wisconsin Statute section 893.155.

The trial court overruled the demurrer on the ground that a question of fact was presented which could only be resolved at trial. That question was whether the fire protection system the defendant installed was an "improvement to real property" within the meaning of the applicable statute of limitations.

On appellate review, the supreme court first found that the fire protection system was an "improvement to property" as a matter of law, and that the demurrer should have been sustained by the trial judge, absent a constitutional challenge or legal defense. The court next determined that a process of interpretation, such as that used in Rosenthal v. Kurtz, could not be utilized in the case at bar to avoid the constitutional question. Under no interpretation of the facts could the date of injury be brought within six years of either the end of defendants' performance of services or the completion of the entire construction. Construction was finished in 1952, but plaintiffs' injury did not come about until 1968. Thus the six-year statute of limitations barred action against those who designed, planned or constructed the fire protection system in 1958, ten years before the harm occurred.

Of the possible grounds for constitutional challenge, the court's opinion in Kallas Millwork dealt with two: denial of equal protection of the laws, in violation of the fourteenth amendment to the United States Constitution, and deprivation of a remedy for a wrong recognized under state law in contravention of article I, section 9, of the Wisconsin Constitution. Violation of the Wisconsin Constitution was dealt with only briefly and in an ambiguous manner. The second paragraph of the opinion flatly stated that section 893.155 was unconstitutional under article I, section 9, because of its denial of a remedy for a recognized right. The penultimate paragraph of the opinion equivocated. There the court stated only that it found "arguable merit" in the argument based upon the Wisconsin Constitution.

88. Other grounds might include: denial of due process of law, discrimination, enactment of special and local legislation, and arbitrary and capricious legislative action.
Constitution and that section 893.155 "appear[ed] to abrogate a remedy for a very real wrong"89 (emphasis added).

Much more thorough analysis and discussion were devoted to the equal protection argument. The plaintiff argued that special immunity was granted to certain members of a class, that protection was withheld from other members of the same class, and that there existed no rational or valid grounds for distinguishing between those who were protected and those who were not. Those persons who performed and furnished "design, planning, supervision of construction or construction" of improvements were afforded immunity by the statute but other potential defendants were not. In particular, material-men were ignored by the statute and owners and occupiers of land were specifically excepted.

Defendant ITT Grinnell argued that a statute of limitations as to any cause of action was a public policy question which should be left to the legislature and that section 893.155 was fair and reasonable in its provision of immunity. Reliance was placed upon decisions of other jurisdictions which had validated similar legislation. In response to the equal protection argument, the Arkansas Supreme Court responded that there was a vital distinction between materialmen and owners on the one hand and architects, designers and contractors on the other.90 The New Jersey and Washington courts also reached similar conclusions in recent cases.91 None of those decisions, however, provided a convincing rationale for distinguishing between the persons protected by the statute and those left without protection. A fourth decision cited by ITT Grinnell, Joseph v. Burns,92 involved a dissimilar Oregon statute93 which

89. 66 Wis. 2d at 393, 225 N.W.2d at 460. A more complete exposition of the denial of remedy argument might have been appropriate. The statute in question is unlike the "typical" statute of limitations which bars claims after a specified time from the accrual of the cause of action. Section 893.155 bases its computation of time upon completion of services and construction, rather than upon the occurrence of an event which gives rise to a claim. Although there are situations, amply illustrated in the medical malpractice field, in which a statute of limitations may bar action before a party realizes he has a cause of action, statutes such as § 873.155 may bar suit long before the cause of action itself accrues.


93. ORE. REV. STAT. § 12.115(1).
did not present the equal protection problem of section 893.155.

The Wisconsin court rejected the Arkansas, New Jersey and Washington cases and adopted the rationale and the language of Illinois and Hawaii decisions in finding the Wisconsin statute violative of equal protection of the laws. The opinion of Justice Schaefer in *Skinner v. Anderson*,94 was quoted at length by the Wisconsin court in relation to the central issue of whether there were true differences to distinguish the statutorily-favored classes from the unfavored:

> [O]f all those whose negligence in connection with the construction of an improvement to real estate might result in damage to property or injury to person four years after construction is completed, the statute singles out the architect and the contractor, and grants them immunity. It is not at all inconceivable that the owner or person in control of such improvement might be held liable for damage or injury that results from a defective condition for which the architect or contractor is in fact responsible. . . .

The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence . . . may cause damage to property or injury to persons. If, for example, four years after a building is completed a cornice should fall because the adhesive was defective, the manufacturer of the adhesive is granted no immunity. . . . But if the cornice fell because of a defective design or construction for which an architect or contractor was responsible, immunity is granted. It cannot be said that the one event is more likely than the other to occur within four years after construction is completed.95

Several paragraphs, to the same effect, were also quoted from the Hawaii decision in *Fujioka v. Kam*.96

In endorsing the Illinois and Hawaii opinions, rather than those of Arkansas, New Jersey and Washington, the Wisconsin court clearly followed the better reasoned and enlightened decisions. The Washington and Arkansas cases were completely inadequate in their discussion of the equal protection issue. The Arkansas court, in *Carter v. Hartenstein*,97 simply stated that there was a valid distinction between designers and occu-

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94. 38 Ill. 2d 455, 231 N.E.2d 588 (1967).
95. 66 Wis. 2d at 389, 390, 225 N.W.2d at 458, 459.
pies or materialmen, but gave no indication of what that distinction was. In *Yakima Fruit v. Central Heating*,\(^9\) the Supreme Court of Washington distinguished *Skinner v. Anderson*\(^9\) with a brief and inaccurate analysis\(^\text{100}\) and upheld its statute on the ground that twenty states had enacted similar legislation, but only Illinois had by that time found its statute to be unconstitutional.

The New Jersey court, in *Rosenberg v. North Bergen*,\(^\text{101}\) presented a lengthy discussion favoring the validity of its recently-enacted statute of repose,\(^\text{102}\) but did not squarely face the equal protection problem.\(^\text{103}\)

The Wisconsin, Illinois and Hawaii opinions demonstrated, however, that injury caused by the negligence of a designer or architect is not more or less likely than harm caused by the negligence of an occupier or materialman. Further, where the negligence of a member of the protected class was the sole proximate cause of harm, recovery against that party may be barred, but the owner or occupier might still be subject to liability. As the Wisconsin court recognized, a statute of limitations to protect those in the construction business might be desirable, yet confinement of its protection to a limited class cannot be justified.

Another statute of limitations problem was posed in *Feest v. Allis Chalmers Corp.*\(^\text{104}\) When he was seventeen years of age,

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98. 81 Wash. 2d 528, 503 P.2d 108 (1972).
99. 38 Ill. 2d 455, 231 N.E.2d 588 (1967).
100. The Washington court attempted to distinguish the Illinois limitation statute, Ill. Rev. Stat. ch. 83, § 24f (1963), from the Washington provision, Rev. Code Wash. § 4.16.300 et seq., by stating that the Illinois statute had been invalidated as being special legislation in favor of only architects and contractors, but that the Washington limitation applied to “*any person* having constructed, altered or repaired any improvement on real property.” 503 P.2d at 111 (emphasis in original). The court ignored the fact that the Illinois statute was applicable also to “*any person*” performing a similar list of services, and that Rev. Code Wash. § 4.16.310 specifically excepted owners and occupiers of land from protection of the statute of limitations at issue. The *Skinner* court had indicated that exception of materialmen and owners and occupiers of land from the protection of the Illinois statute was an important consideration in its finding of constitutional invalidity.
101. 61 N.J. 190, 293 A.2d 662 (1972).
103. The court indicated that the legislature could reasonably grant special immunity to architects, designers and those responsible for construction when similar immunities which those persons formerly enjoyed under common law were recently abolished by court decision.
104. 68 Wis. 2d 760, 229 N.W.2d 651 (1975).
the plaintiff was allegedly injured by a defect in farm machinery manufactured by the defendant. At the time of his injury the Wisconsin age of majority was twenty-one. Approximately two months before the plaintiff attained the age of twenty-one, the age of majority was lowered to eighteen. The action in the case at bar was commenced eleven months after plaintiff attained the age of twenty-one, and thirteen months after the effective date of the Age of Majority Act.

The defendant sought and obtained summary judgment in the trial court on the ground that the statute of limitations had run as to plaintiff's claim. The trial court found that the plaintiff had one year from the effective date of the lowered age of majority within which to commence action, and that the action was barred by section 893.33, as amended. It was contended by the plaintiff, however, that the amendment to section 893.33 did not or should not apply to causes of action which had accrued prior to the effective date of that amendment, and that he, the plaintiff, should have had one year from his twenty-first birthday in which to bring suit.

In support of his argument on appeal, the plaintiff cited sections 990.06 and 991.07 and Thom v. Sensenbrenner. The statutes cited by the plaintiff provided that where a limitation period had begun to run, subsequent legislative repeal of the limitation period applied only to rights or remedies accruing after the repeal had taken effect. The former limitation period was to continue in effect as to a limitation period which had previously begun to run unless the repealing act expressly provided otherwise, or unless another statutory rule was prescribed in a special case. Under the predecessor to section 990.06, the Wisconsin court in Thom v. Sensenbrenner, held

107. Wis. Stat. § 893.33 (1973), as amended by the Age of Majority Act, provides in pertinent part:

893.33. Persons under disability. If a person entitled to bring an action mentioned in this chapter . . . be, at the time the cause of action accrued, . . .
(1) Within the age of 18 years; . . .
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(3) . . . the time of such disability is not part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended . . . in any case longer than one year after the disability ceases.
108. 211 Wis. 208, 247 N.W. 870 (1933).
a legislative alteration of a limitation period inapplicable to a
plaintiff's existing cause of action.

The *Thom* case was distinguished and sections 990.06 and
991.07 were held inapplicable, however, in the case at bar be-
cause the *Age of Majority* Act became effective prior to the
plaintiff's twenty-first birthday. In accord with *Christie v.
Schwartz*, the court held that the plaintiff's disability during
minority tolled the running of the statute of limitations, and
that the limitation period itself did not begin until disability
was removed by achievement of majority. The court ruled that
the statutes were, by their terms, applicable only to limitation
periods which had already begun to run at the time of repeal
or amendment of the statute of limitations involved. Since the
tolling period, rather than the limitation period, was in effect
at the time of amendment, sections 990.06 and 991.07 were held
to be of no avail to the plaintiff. Thus, even though the statute
of limitations was amended after the plaintiff's cause of action
accrued, he was not entitled to the benefit of the former limita-
tion period.

The plaintiff still had, pursuant to section 893.33, one year
from removal of disability in which to bring action. Consistent
with previous Wisconsin criminal and juvenile delinquency
cases, the court held that the plaintiff's disability was re-
lieved on the effective date of the *Age of Majority* Act. Even
though the act advanced the date after which the plaintiff's
claim would be barred, the legislation nevertheless provided a
reasonable time in which action could be commenced and was
therefore unobjectionable.

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110. 49 Wis. 2d 760, 183 N.W.2d 81 (1971).
111. Truesdale v. State, 60 Wis. 2d 481, 210 N.W.2d 726 (1973); State *ex rel.
112. *See* *Shaurette v. Capitol Erecting Co.*, 23 Wis. 2d 538, 128 N.W. 2d 34 (1964);
Swanke v. Oneida County, 265 Wis. 92, 60 N.W.2d 756 (1953); *Arnold v. Davis*, 503
S.W.2d 100 (Tenn. 1973).